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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

DEMETRIUS GREEN,

Petitioner

V.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF CONNECTICUT

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November 19, 1984

23 pp

QUESTIONS PRESENTED

1. Whether the State of Connecticut was relieved of its obligation of proving each and every element of the crime charged beyond a reasonable doubt, thereby denying the petitioner due process of law.

2. Whether the standard of review employed by the Supreme Court of Connecticut conflicts with the standards mandated by the decision of this Court in Jackson v. Virginia, 443 U.S. 307 (1979).

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The petitioner, DEMETRIUS GREEN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on August 14, 1984.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 194 Conn. 258 (1984) and appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on August 14, 1984. A timely motion to reargue was denied on September 26, 1984, by that court, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the State of Connecticut was relieved of its obligation of proving each and every element of the crime charged beyond a reasonable doubt, thereby

denying the petitioner due process of law.

2. Whether the standard of review employed by the Supreme Court of Connecticut conflicts with the standards mandated by the decision of this Court in Jackson v. Virginia, 443 U.S. 307 (1979).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV

Section 1. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATUTORY PROVISIONS INVOLVED

CONNECTICUT GENERAL STATUTE, SEC. 53a-65, in pertinent part:

Definitions. As used in this part,

except section 52a-70b, the following terms have the following meanings:

(1) "Actor" means a person accused of sexual assault.

(2) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio or cunnilingus between person regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emmission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body. Its meaning is limited to persons not married to each other.

(3) "Sexual contact" means any contact with the intimate parts of a person not married to the actor for the purpose of

sexual gratification of the actor.

(4) "Use of force" means: (a) Use of a dangerous instrument; or (b) use of actual physical force or violence or superior physical strength against the victim.

(8) "Intimate parts" means the genital area, groin, anus, inner thighs, buttocks or breasts.

CONNECTICUT GENERAL STATUTE, SEC. 53a.-70a, in pertinent part: Sexual Assault in the First Degree: Class B felony (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such

person to fear physical injury to such person or a third person.

CONNECTICUT GENERAL STATUTE

SEC. 53a-72a, in pertinent part: Sexual Assault in the Third Degree: Class D felony. (a) A person is guilty of sexual assault in the third degree when such person (1) compels another person to submit to sexual contact (A) by the use of force against such other person or a third person, or (B) by the threat of use of force against such other person or against a third person, which reasonably causes such person to fear physical injury to such person or a third person.

CONNECTICUT GENERAL STATUTE

SEC. 53a-49(a), in pertinent part: Criminal Attempt: Sufficiency of conduct; renunciation as defense. (a) A person is

guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the

actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession collection or fabrication of materials to be employed in the commission

of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances, (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

STATEMENT OF THE CASE

Demetrius Green, the petitioner here, was convicted in the Connecticut Superior Court of attempted sexual assault in the first degree in violation of Connecticut General Statues §§53a-70(a) and 53a-49(a). The Connecticut Supreme Court affirmed the conviction.

That court ruled that a jury could have reasonably found sufficient facts to support a conviction for attempting to

forcibly compel another to engage in sexual intercourse based upon the following scenario:

Jacqueline McCauley, a sixteen year old student, claimed that on September 23, 1979, at about 7:30 p.m. a black male, armed with a gun, approached her near a park in New Haven and ordered her to "[t]urn the other way" and to go into some bushes behind a park fence; he told her "to lay down and take [her] clothes off." [Tr. pp. 11-12] She avoided doing this by various artifices and excuses; she fumbled with her pants, but did not in fact "undo them." [Tr. pp 13] She claimed that the man "knelt down . . . on the ground, started to "loosen his pants [and] started to undo his button." [Tr. pp. 13-14] When she started to scream, the man struck her

and told her that "[she] was dead." While the man was trying the force her pants off, the zipper on her pants broke. Without further activity the man suddenly said, "Get up. Get out of here." [Tr. p. 15]

The petitioner argued to the Connecticut Supreme Court, inter alia, that the State had failed to sustain its burden of proof and had not proved each essential element of the crime beyond a reasonable doubt. The petitioner argued that the State had been unconstitutionally relieved of its burden of proving an essential element of attempted rape -- attempted penetration. He further argued that the State had proved facts sufficient to support only a conviction of the lesser included offense of attempted sexual contact in violation of Connecticut General

Statute §53a-65 (3).

The Connecticut Supreme Court held that the conduct described above constituted a "substantial step" toward commission of the crime, and thus found that the State had sustained its burden of proving attempted rape.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE CONNECTICUT SUPREME COURT OF THE STATE OF CONNECTICUT IS IN CONFLICT WITH JACKSON V. VIRGINIA, 443 U.S. 307.

It is, of course, well established that the Due Process clause of the Fourteenth Amendment safeguards against dilution of the fundamental principle of our jurisprudence that guilt is to be established only by probative evidence and beyond a reasonable doubt. In re Winship,

397 U.S. 358 (1970). This Court has, for more than a decade, held fast to the Winship principle that the prosecution bears the burden of proving each and every element of the crime charged beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 1977); Sandstrom v. Montan, 442 U.S. 510 (1979); Connecticut v. Johnson, 460 U.S. ; 103 S. Ct. 969 (1983)

In Jackson v. Virginia, 443 U.S. 307, 315 (1979), this Court ruled, inter alia, that the reasonable doubt standard as enunciated in Winship requires the factfinder to "reach a state of near certitude of the guilt of the accused ..." While Jackson v. Virginia, clarified the role of the federal appellate courts for purposes of habeas corpus review of

sufficiency of evidence claims, this Court has not, for almost twenty-five, years, since Thompson v. Louisville, 362 U.S. 199 (1970), given any clear direction to State trial and appellate courts regarding the quantum of evidence necessary to satisfy the rigid requirements of Winship.

The case at bar presents an opportunity to assess the quantum of evidence necessary to satisfy the prosecutorial burden under Winship when an attempt crime is charged. As Justice Stewart argued in his dissent from denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111 (1977), the "no evidence rule" of Thompson should be reassessed in light of the requirements of Winship. Certainly, in light of this Court's reaffirmance of the burden of proof requirements in Mullaney and Sandstrom, the

need to clarify the standard for attempt crimes is even more pressing.

While Jackson v. Virginia held that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt, Tibbs v. Florida, 457 U.S. 31 (1982) the case at bar demonstrates, all too painfully, the minute quantum of evidence found to be sufficient to prove guilt beyond a reasonable doubt in attempt crimes.

Mr. Green was convicted of attempted sexual assault in the first degree in violation of Connecticut General Statute §§53a-70. The only type of sexual activity prohibited by this statue is sexual intercourse, as that term is defined by Connecticut General Statute §53a-65(2).

These statutes define sexual intercourse as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete . . . intercourse . . . . Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." The Connecticut Supreme Court held that despite the fact that the State had presented no direct, indirect, or circumstantial evidence, of any kind whatsoever, to establish that the attempted crime involved sexual intercourse, or that penetration was in any way attempted, the petitioner could lawfully be convicted of attempted sexual assault.

The record in the case at bar, even

when viewed in the light most favorable to the prosecution, as required under Jackson v. Virginia, is absolutely devoid of any evidence capable of proving, beyond a reasonable doubt, that penetration was attempted or even contemplated.

Furthermore, the standard employed by the Connecticut Supreme Court, i.e. that in reviewing a claim challenging the sufficiency of the evidence, the evidence must be given a construction most favorable to sustaining the verdict reached by the jury, is in sharp conflict with the standard for appellate review enunciated by this court in Jackson v. Virginia. The Connecticut standard does violence to the Due Process Clause requirement that the evidence must be sufficient to persuade a rational trier of fact beyond a reasonable doubt.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted:

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November 19, 1984